SUPPLEMENTAL APPENDIX A

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April 2, 2002

Office of the Clerk
US District Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, California 94119-3939

Re: Supplemental Authority
Cole v. Cuprum.
Ninth Circuit No. 01-35491

Dear Clerk:

Pursuant to Fed. R. App. P 28(j), enclosed please find the following supplemental authority in the above matter.

In the briefing, the parties disagree as to the quantum of evidence necessary to defeat a summary judgment motion against a punitive damage claim. Cuprum contends that Cole was required to "submit clear and convincing evidence." Cuprum's Answering Brief at 24. Cole, on the other hand, contends that the submission of evidence supporting an inference of conduct giving rise to punitive damages is sufficient. Cole's Opening Brief at 28; Cole's Reply Brief at 18.

On March 28, 2002, the Oregon Supreme Court in *Bolt v. Influence Inc.* SC, S48510, 2002 Ore. LEXIS 217(March 28, 2002), held that the "clear and convincing" burden of proof governing the recovering of punitive damages does not apply in determining the sufficiency of evidence to defeat a motion for directed verdict:

> "[T]he 'clear and convincing' burden of proof in ORS 18.537(1), which refers to the ultimate burden of proof that a plaintiff must meet to recover punitive damages, has no relation to the burden associated with the 'directed verdict' standard used to review the sufficiency of evidence on a motion under ORS 18.535(3). A plaintiff satisfies the latter by producing some evidence in support of a *prima facie* case. *Brown*, 306 Or at 602. *See also Wootten*, 286 Or at 135-36 (in deciding whether to submit case to jury, 'we are unconcerned with the quantum of evidence. Our concern is only with the existence of evidence which, if accepted as being true by the trier of fact, would establish [the fact in question].').
>
> "In summary, we conclude that the trial court erred in using a 'clear and convincing' evidentiary standard to review the sufficiency of evidence submitted under ORS 18.535(3) in support of plaintiffs' motion to amend their complaint to request punitive damages. That provision requires a court to deny such a motion only if the evidence submitted is not adequate to overcome an opposing motion for a directed verdict – *i.e.*, only if there is 'no evidence' from which the jury could find the facts necessary to

establish an element of plaintiffs' claim."

For your convenience enclosed is a copy of the opinion.

Thank you for your courtesies.

Very truly yours,

Michael H. Bloom

MHB/sl

enclosure

cc: Timothy O'Neil with enclosure

John Holmes with enclosure

SUPPLEMENTAL APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 01-35491

PAUL COLE,

Plaintiff-Appellant,

v.

BUILDERS SQUARE, INC., a Delaware corporation;
CUPRUM, S.A. de C.V.,

Defendant-Appellee

PETITION FOR REHEARING

Appeal from the Judgment of the United States District Court for the District of Oregon
Honorable Owen M. Panner,
United States District Court Judge

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Of Attorneys for Plaintiff-Appellant
Paul Cole

[Page 4] Although this panel issued an unpublished opinion, by affirming the Magistrate's opinion, this panel gave its stamp of approval to the Magistrate's erroneous holding. This panel's rationale for doing so – that the Magistrate was [Page 5] entitled to apply the federal standard rather then the Oregon standard to the quantum of evidence necessary to overcome the moving party's summary judgment motion[1] – cannot justify the error.

* * *

[Page 6] If federal law were to trump Oregon law in this manner, then it would be more than simply applying federal over state procedure, it would be a trespass upon Oregon's core *substantive* right to regulate the standard of care that manufacturers must exercise when selling products within her boundaries.

Absent federal preemption, Oregon's right to determine when a manufacturer is on notice that its conduct is unacceptable and gives rise to a duty to act, remains unequivocal and inviolate.

Dated this 30th day of October, 2002.

Respectfully Submitted,

BLOOM & SCHUCKMAN, P.C.

By: /s/ Michael H. Bloom
Michael H. Bloom, OSB No.81510
Of Attorneys for Plaintiff Paul Cole

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[1] Add-4.